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SUPREME COURT, U.S.

No. 06-406

In the Supreme Court of the United States

CHARLES WINSTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an agent was justified in conducting a protective sweep of the basement of petitioner's home while other agents proceeded upstairs and arrested petitioner on the second floor.

2. Whether petitioner consented to the agents' retrieval of his identification from his nightstand.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 444 F.3d 115. The opinion of the district court (Pet. App. B1-B10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 2006. A petition for rehearing was denied on June 16, 2006 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on September 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was charged with distributing cocaine, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18

U.S.C. 924(c)(1). C.A. App. 6-7. The district court suppressed items seized during a warrant-authorized search of petitioner's home. Pet. App. B6-B9. The government appealed, and the court of appeals reversed. *Id.* at A1-A22.

1. a. On October 14, 2003, petitioner and about 25 other individuals were charged in a second superseding indictment with conspiracy to possess cocaine, cocaine base, and heroin with intent to distribute, in violation of 21 U.S.C. 846. Petitioner was also charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The indictment grew out of a federal investigation into a large-scale cocaine trafficking organization that was based in Springfield, Massachusetts, and supplied by individuals in the New York City and Philadelphia areas. Pet. App. A2; Gov't C.A. Br. 4-5.

On October 15, 2003, agents went to petitioner's home in Springfield in order to execute a warrant for his arrest. Some of the agents were familiar with petitioner and his girlfriend, and they recognized his distinctively painted BMW parked outside. One agent, Patrick Burns, had arrested petitioner and two other individuals about two weeks earlier for possession of a handgun. One of petitioner's co-defendants had informed the agents that he had sold petitioner two handguns and a bulletproof vest. Pet. App. A2; Gov't C.A. Br. 5.

The agents did not notice any other cars near petitioner's residence, a duplex located at 110 Carr Street. They surveilled the residence, hoping that petitioner would exit. After an hour and a half, one group of agents approached the front door, while another group, which included Agent Burns, went to the back of the residence. Agent Donald Wales knocked on the door of unit 110A, and petitioner's girlfriend, Elizabeth Ortiz,

answered. Because the agents at the door did not know who she was, they asked Ortiz if she knew who owned the BMW parked out front; Ortiz denied knowing the owner and suggested that the agents check next door. The agents then knocked on the door of unit 110B, but no one answered. Pet. App. A3, B1-B3; Gov't C.A. Br. 5-6.

After about five minutes, Agent Wales knocked again on the door of unit 110A. By this time, Agent Burns had come around to the front of the residence, concerned by the delay. When Ortiz opened the door, Agent Burns immediately recognized her as petitioner's girlfriend and confronted her with that fact. Ortiz began to stammer and became visibly nervous; her eyes grew large and the carotid vein on her neck began pulsating. Concluding that petitioner was inside, the agents pushed past Ortiz and entered the home. Pet. App. A3, B3; Gov't C.A. Br. 6-7; C.A. App. 28.

After advising Ortiz that they had a warrant for petitioner's arrest, Agent Wales followed the other agents inside and yelled out "Chuck." From upstairs, petitioner responded "up here." Wales and another agent then began proceeding cautiously upstairs with their guns drawn, and they observed a child near the top of the stairs. Wales later testified that it was one of the most tense situations he had faced while in law enforcement because he was concerned about the child but feared an ambush. Upon reaching the top of the stairs, the agents saw petitioner in the hallway talking on a cell phone. At this point, approximately 20 seconds had passed since the agents entered the home. The agents ordered petitioner to drop the phone, and they placed him under arrest. Pet. App. A3, B3-B4; Gov't C.A. Br. 7-8; C.A. App. 29-30, 66-67. While these agents arrested peti-

tioner, Agent Burns, who had been waiting at the bottom of the stairs, went up to the second floor to bring the child downstairs. Pet. App. A3, B4; Gov't C.A. Br. 8.

After handcuffing petitioner, the agents, per Agent Wales' standard procedure, asked petitioner for identification.[1] Petitioner said that it was in the nightstand in his bedroom. The agents went into the bedroom but were unable to locate the nightstand due to the large piles of clothes there. The agents escorted petitioner into the bedroom and asked for his identification a second time, whereupon petitioner pointed to the nightstand with his shoulder. One of the agents opened the nightstand, found petitioner's wallet lying on top of a large amount of cash, and pulled out his identification. Pet. App. A3-A4, B5; Gov't C.A. Br. 9.

While Agent Wales proceeded cautiously upstairs upon entering the home, State Trooper Mike Martin immediately moved off to the right, proceeded through the living room and kitchen, and went downstairs into the basement. He there observed an object covered by a blanket that occupied a space that appeared large enough to hide a crouching person. Trooper Martin removed the blanket and discovered a safe approximately 24 inches high by 17 inches wide by 27 inches deep. After securing the safety of the child, Agent Burns entered the basement and Trooper Martin showed him the safe. The two agents then went upstairs and, as the other agents were taking petitioner outside, informed them of

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[1] Although Agent Wales was generally familiar with petitioner's appearance, the agent had seen only glimpses of him during past surveillance. Agent Burns, who was more familiar with petitioner, did not see petitioner when he went up to the second floor to retrieve the child. Pet. App. B3-B4; Gov't C.A. Br. 9; C.A. App. 53-54, 88.

the discovery. Petitioner stated, "That's my safe." Pet. App. A4, A8, B3-B4; Gov't C.A. Br. 7-10; C.A. App. 41.

b. Later that day, the agents applied for and obtained a warrant to search petitioner's home, based largely on their discovery of the safe and the large amount of cash in petitioner's nightstand. Upon executing the search warrant, the agents seized (1) two grocery bags containing about $58,000 of currency from the safe, which had a strong odor of cocaine; (2) a .45 caliber pistol and ammunition from a room adjoining petitioner's bedroom; (3) the cash from the nightstand; and (4) other items from petitioner's bedroom, including a scale with white powder residue on it and additional rounds of ammunition. Pet. App. B6; Gov't C.A. Br. 10-11; C.A. App. 43-44.

2. On May 11, 2004, a grand jury sitting in the District of Massachusetts returned a separate indictment against petitioner charging him with distributing and possessing with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1), and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). C.A. App. 6-7.

Petitioner moved to suppress his post-arrest statements and the items seized during the warrant-authorized search of his home on the ground that they were the fruit of information unlawfully observed by the agents while executing the arrest warrant. Following a hearing, the district court granted petitioner's motion as to the evidence seized under the warrant and his statement claiming ownership of the safe. The court held that the agents' observation of the safe in the basement and the cash in the nightstand violated the Fourth Amendment, tainting the warrant to search petitioner's home. Pet. App. B1-B10. As to the safe, the court rea-

soned that the agents had no need to search the basement in order to locate petitioner pursuant to the arrest warrant because they had taken him into custody immediately upon entering the premises. *Id.* at B8. The court further reasoned that discovery of the safe was not lawful because agents had no reason to suspect that other individuals posing a threat to their safety were inside petitioner's home, and therefore there was no justification to do a protective sweep. *Id.* at B8-B9. Finally, the court determined that petitioner's responses to the agents' questions about the location of his identification did not amount to consent to search the nightstand. *Id.* at B7.[2]

3. The government appealed the district court's suppression order insofar as it pertained to the case brought against petitioner on May 11, 2004.[3] Gov't C.A. Br. 4. The court of appeals reversed, holding that the agents' search of the basement and nightstand did not violate the Fourth Amendment and, accordingly, did not

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[2] The court also concluded that the agents' search (1) was not justified as incidental to the arrest because petitioner had been apprehended in the hallway, and (2) was not justified by the doctrine of inevitable discovery because there was insufficient evidence that a search warrant would have issued absent the discovery of cash in the nightstand. Pet. App. B7-B8. Further, the court held that the good faith exception to the warrant requirement did not apply because it believed the warrant application had omitted important information about the discovery of the safe and cash in the nightstand. *Id.* at B9. The court found no evidence that the agents had acted in bad faith, but concluded that "a reasonable officer should have known that the observations of the cash and the safe violated constitutional boundaries." *Ibid.*

[3] The government also filed a notice of appeal of the court's order in the conspiracy case (in which petitioner had been charged on October 14, 2003), but the government subsequently withdrew its appeal in that case. Gov't C.A. Br. 4 n.2.

taint the warrant-authorized search of petitioner's home. Pet. App. A4-A13.

a. The court held that the agents discovered the safe during a lawful protective sweep of the basement incident to petitioner's arrest. The court noted two requirements for a protective sweep under *Maryland* v. *Buie*, 494 U.S. 325 (1990). First, the law enforcement officers that conduct the sweep "must have a reasonable suspicion of danger: 'there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.'" Pet. App. A5 (quoting *Buie*, 494 U.S. at 334). Second, "[t]he sweep 'may extend only to a cursory inspection of those spaces where a person may be found,'" and may last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Ibid.* (quoting *Buie*, 494 U.S. at 335-336).

The court held that the arresting agents had reasonable suspicion to believe that a dangerous person could be hiding in the basement. Pet. App. A7. Petitioner "was a potentially dangerous drug dealer who had recently purchased a bullet-proof vest and firearms and had numerous, potentially armed and dangerous cohorts." *Ibid.* That risk of danger "was compounded" by petitioner's girlfriend's ruse in sending the agents next door, "which gave any potential occupants inside the house five minutes to conceal themselves or prepare an ambush." *Ibid.* The court also found petitioner's response to the calling of his name ("up here") to be unusual: "His casual, inviting response could lead a reasonable agent to believe that it was part of a scheme to

lead the agents away from the basement because others were hiding there waiting to escape or launch a surprise attack on the agents." *Ibid.* Noting that agents "put themselves in a dangerous situation" when they "arrest an armed criminal with known cohorts in his home," the court concluded that a "reasonably prudent agent" could believe there was someone hiding in the basement. *Id.* at A7-A8. The court additionally held that the scope of the protective sweep was permissible because, upon entering the premises, "agents walked immediately through the first floor and basement and moved a blanket covering a space large enough for a person to hide." *Id.* at A8.

b. Next, the court held that the search of the nightstand was lawful because petitioner had implicitly and voluntarily consented to it. Pet. App. A10-A13. The court noted that petitioner had verbally indicated that his wallet was in his nightstand in response to the agents' request for identification. *Id.* at A11. Furthermore, after agents had been unable to find the nightstand, escorted petitioner into his room, and repeated their request for identification, petitioner "indicated with a shoulder movement in the direction of the nightstand." *Ibid.* The court of appeals reasoned that, "[w]hile the agents did not explicitly ask for permission to open the drawer to retrieve [petitioner's] identification, the circumstances described would reasonably lead the agents to conclude that [petitioner] was consenting to the opening of the drawer in the nightstand for the retrieval of his wallet and identification." *Ibid.* Moreover, the court of appeals explained that its finding of "implied-in-fact consent" was supported by the mundane subject matter and routine nature of the agents' request. *Id.* at A12-A13.

c. Dissenting in part, Judge Stahl would have held that the basement search was not a lawful protective sweep. Pet. App. A16-A22. In his view, "the agents in this case had no information indicating affirmatively that anyone other than [petitioner] was in the house." *Id.* at A19. Judge Stahl acknowledged that petitioner had bought two guns and a bulletproof vest from a co-conspirator, and had been carrying a handgun during a traffic stop, but found that these facts "did nothing to justify a belief that there was anyone else in the house with [petitioner] on the day of his arrest." *Id.* at A21. Nor did he find petitioner's unusual response to the calling of his name sufficient to justify a protective sweep because it did not amount to an "affirmative indication * * * that a third person may be lying in wait." *Id.* at A21.[4] Judge Stahl did not dissent from the majority's determination of implied consent to search the nightstand.

d. The court of appeals denied a petition for rehearing en banc on June 16, 2006. Pet. App. C1-C2. Judge Lipez dissented from that decision as to the issue of the protective sweep. *Id.* at C2.

ARGUMENT

Petitioner claims (Pet. 6-9) that review is warranted because the court of appeals erroneously eliminated the "subjective component" of the standard for a lawful protective sweep under *Maryland* v. *Buie*, 494 U.S. 325 (1990), and erroneously concluded that the search of his nightstand was consensual when the agents did not ex-

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[4] Judge Stahl also concluded that the basement search could not be justified as an attempt to locate petitioner pursuant to the arrest warrant, or under either the inevitable discovery doctrine or the good faith exception to the warrant requirement. Pet. App. A14-A16, A22 n.6.

plicitly request consent to search. Those claims do not warrant further review by this Court.

1. This Court's review is unwarranted for the threshold reason that the interlocutory posture of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition). The decision of the court of appeals reverses the suppression of evidence and remands the case for further proceedings, including ultimately a trial on the charges against petitioner. This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). The denial of certiorari at this time does not preclude petitioner from raising the same issues in a later petition if he is ultimately convicted on the charges against him. Deferring review until final judgment promotes judicial efficiency by ensuring that, if petitioner is convicted, all of the claims on which he seeks review will be consolidated and presented in a single petition to this Court.

2. Petitioner contends (Pet. 7) that Trooper Martin's examination of the safe exceeded the bounds of a legitimate protective sweep under *Maryland* v. *Buie*, *supra*. The court of appeals, however, correctly applied *Buie* to the facts of this case.

In *Buie*, this Court held that when police officers enter a residence to execute an arrest warrant, they may take several steps. First, "until the point of [the] arrest," the officers may "search anywhere in the house that [the subject of the warrant] might have been

found." 494 U.S. at 330. Following and incident to the arrest, police officers may "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. Beyond that, police officers may conduct a protective sweep of those spaces where a person may be found if "articulable facts, * * * taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Ibid.* The court of appeals concluded that Trooper Martin's entry into the basement and sweep of the area in which the safe was found was justified under the last rationale. See Pet. App. A7.

a. The court of appeals correctly determined that the agents had reason to believe that a dangerous individual might be hiding in the basement. The agents arrived at petitioner's home to arrest him for his role in a large-scale drug trafficking conspiracy. They knew that petitioner was a drug dealer, that he had purchased two handguns and a bulletproof vest from a co-conspirator, and that he recently had been arrested, along with two individuals, for possession of a loaded handgun. Pet. App. A2; C.A. App. 28-29, 35, 53, 78-80.[5] His girlfriend, Ortiz, falsely denied knowing who drove the BMW

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[5] At the suppression hearing, Agent Wales testified that weapons often "go hand in hand" with drug distribution and that drug dealers, "when they're desperate," even use weapons "to protect themselves from law enforcement." C.A. App. 39; see *United States* v. *Martins*, 413 F.3d 139, 150 & n.4 (1st Cir.) (law enforcement entitled to rely on experience in determining need for protective measures), cert. denied, 126 S. Ct. 644 (2005).

parked outside and sent the agents next door, causing them to lose five minutes of valuable time. Once the agents discovered Ortiz's trickery, they could reasonably believe, in light of everything else they knew about petitioner, that the purpose of her deception was to buy time for him and some of his confederates to arm and to conceal themselves in preparation for an ambush if the agents eventually gained entry to the residence. Cf. *United States* v. *Talley*, 275 F.3d 560, 564 (6th Cir. 2001) (holding that protective sweep was justified when police were aware of two additional people inside a home and were "misinformed about their presence" by the owner).

This reasonable suspicion was reinforced by the petitioner's casual response to the calling of his name, which agents testified was unusual, see C.A. App. 66, and could appear to a reasonable agent to be part of a plan to lure him away from the basement so that others could escape or ambush him from behind. Alternatively, because petitioner did not appear surprised to hear a man's voice calling his name from a lower floor, the casual invitation upstairs could lead an agent reasonably to infer that an unidentified male was present in the home. See Gov't C.A. Br. 7-8.

b. Petitioner contends (Pet. 6) that the entry into the basement was illegal because the agents purportedly admitted at the suppression hearing that "they had no reason to believe that anyone * * * was anywhere on the premises" when they swept petitioner's basement. *Ibid.* Petitioner is mistaken. Agent Wales agreed that he had no reason to believe that anybody was in the residence in response to the question whether "there was any other specific person that [he] knew of" in the apartments, C.A. App. 61, and he testified that he had no "specific information" that there was anyone else in the

home, *id.* at 73. Similarly, Agent Burns stated that he had no "specific information" that someone was in the basement. *Id.* at 90.

This Court in *Buie*, however, ruled that the test is whether "articulable facts * * * would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene," 494 U.S. at 334, not whether the officer had "specific information" that a particular individual was present. Contrary to petitioner's claim, the test embodies an objective standard, consistent with the standard used in other Fourth Amendment contexts. See *Whren* v. *United States*, 517 U.S. 806, 813 (1996); *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985); see also *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) (probable cause determined "from the standpoint of an objectively reasonable police officer"); *United States* v. *Martins*, 413 F.3d 139, 149 (1st Cir.) (reasonable suspicion "is an objective standard; its existence 'centers upon the objective significance of the particular facts under all the circumstances'") (quoting *United States* v. *Woodrum*, 202 F.3d 1, 7 (1st Cir.), cert. denied, 531 U.S. 1035 (2000)), cert. denied, 126 S. Ct. 644 (2005). Because the court of appeals correctly determined that a reasonably prudent officer would have been warranted in believing that the basement harbored a dangerous person, the agents' subjective beliefs were irrelevant.

In any event, Ortiz's deception and petitioner's unusual response to his name provided the agents with information indicating that dangerous individuals might be on the premises when they swept the basement. The agents' swift decision to push past Ortiz and enter the home once they uncovered her ruse reflected an awareness that the unsecured residence was a threat to their

safety, particularly given the five minutes that had elapsed since they had made their presence known. Even if the agents lacked specific information regarding the presence of other individuals when they arrived at petitioner's home, the subsequent developments provided them with articulable facts from which to conclude that the premises harbored dangerous individuals. The court of appeals' decision therefore does not conflict with any of the cases cited by petitioner (Pet. 7-8) for the proposition that lack of information is insufficient to support a protective sweep.[6]

3. Petitioner next contends (Pet. 9) that the court of appeals erred in holding that he implicitly consented to a search of his nightstand, and that the decision of the court of appeals conflicts with decisions of the Fifth and Ninth Circuits. These claims lack merit.

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[6] See *United States* v. *Gandia*, 424 F.3d 255, 263-264 (2d Cir. 2005) (police responded to report of argument between superintendent and tenant; information indicated only that defendant may have had a gun); *United States* v. *Moran Vargas*, 376 F.3d 112, 116 (2d Cir. 2004) (Drug Enforcement Administration received tip that drug courier checked into motel by himself; nothing during agents' interview of defendant in motel room suggested second person hiding in bathroom); *United States* v. *Chaves*, 169 F.3d 687, 691-692 (11th Cir.) (sweep of locked warehouse after defendants arrested outside; police had no information about inside of warehouse and sweep occurred 45 minutes after arrest), cert. denied, 528 U.S. 1022 and 1048 (1999); *Sharrar* v. *Felsing*, 128 F.3d 810, 824-825 (3d Cir. 1997) (police had been told that arrestee was accompanied by three accomplices, but all four individuals already in custody outside when police swept premises); *United States* v. *Colbert*, 76 F.3d 773, 775, 777 (6th Cir. 1996) (protective sweep after defendant arrested outside apartment where he was staying; only fact arguably supporting reasonable suspicion was that defendant's girlfriend frantically burst out of premises when defendant arrested, but police knew all along it was her apartment).

a. The existence of consent to search, and the voluntariness thereof, are questions of fact that are determined from the totality of the circumstances. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973) (explaining that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances"); see *United States* v. *Mendez*, 431 F.3d 420, 427 (5th Cir. 2005); *United States* v. *Miller*, 589 F.2d 1117, 1130 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979).

The court of appeals in this case correctly determined that petitioner had implicitly consented to a search of his nightstand for the limited purpose of retrieving his identification. Petitioner responded to Agent Wales' request for identification by stating that it was in the nightstand in the bedroom, Pet. App. A11, and, after the agents were unable to locate the nightstand and asked him again where the identification was, he motioned to the nightstand with his shoulder. *Ibid.* In the context of the agents' requests, petitioner's verbal and non-verbal responses leading them to the nightstand evidenced his consent to search the nightstand for the limited purpose of retrieving his identification. See, *e.g.*, *United States* v. *Zapata*, 18 F.3d 971, 977 (1st Cir. 1994) ("[I]t is settled law that the act of handing over one's car keys, if uncoerced, may in itself support an inference of consent to search the vehicle."); cf. *United States* v. *McRae*, 81 F.3d 1528, 1538 (10th Cir. 1996) (failure to object to continuation of search supports inference that search was within scope of the consent); *United States* v. *Morris*, 977 F.2d 677, 688 (1st Cir. 1992) (implied consent to search briefcase found in part

because defendant gave officers combination to locked briefcase), cert. denied, 507 U.S. 988 (1993).

b. Petitioner argues (Pet. 9) that he did not consent to the search because the agents did not expressly request permission to search for his identification. A bright-line rule requiring an express request to search before consent may be implied, however, is at odds with the totality of the circumstances standard under which the existence and voluntariness of consent are judged. See p. 15, *supra*. In this case, by the second time the agents asked for petitioner's identification, their purpose—to retrieve the identification from the nightstand—was obvious, and the statements thus constituted an implied request for consent to search. Cf. *United States* v. *McRae*, 81 F.3d at 1538 (failure to object to continuation of search supports inference that search was within scope of the consent); *United States* v. *Gaines*, 441 F.2d 1122, 1123 (2d Cir.) (finding consent to search where, in response to request for identification, defendant pointed to jacket and said that identification could be found in it), vacated and remanded on other grounds, 404 U.S. 878 (1971). The cases upon which petitioner relies for the proposition that "[o]ther circuits have refused to find an implied consent where there is no express or *implied* request to search," therefore are not contrary. See Pet. 9 (emphasis added) (citing *United States* v. *Jaras*, 86 F.3d 383, 390 (5th Cir. 1996); *United States* v. *Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990)). Further review of petitioner's fact-bound claim is unwarranted.

c. Finally, petitioner claims (Pet. 9) that the court of appeals failed, as required by its precedents, to review the district court's lack-of-consent finding for clear er-

ror.[7] Yet the court of appeals expressly recognized that it "review[s] the district court's findings on voluntariness and consent for clear error," Pet. App. A10, and that it "do[es] not lightly reverse a district court's holding" under that standard of review. *Ibid.* The court of appeals also "note[d] that the facts surrounding the search of the nightstand [were] undisputed, and thus [it was] not disturbing the district court's findings of historical facts or credibility." *Id.* at A12. The court of appeals thus accorded the district court's "terse[] f[i]nd[ing] that [petitioner] did not consent to the search of the nightstand," *id.* at A10, the appropriate amount of deference. Petitioner's fact-bound claim to the contrary warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2006

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[7] The district court made no finding on the voluntariness of consent. Pet. App. A12-A13. Petitioner does not challenge the court of appeals' determination that his consent was voluntary.